

September 9, 2008

Councilman George Smiley
800 North French Street, 8th Floor
Wilmington, DE 19801

**RE: Freedom of Information Act Complaint Against
New Castle County**

Dear Councilman Smiley:

On August 19, 2008, the Delaware Department of Justice (DDOJ) received your complaint alleging that New Castle County violated the Freedom of Information Act (FOIA), 29 *Del. C.* § 10001 *et seq.*, by refusing to provide you with records that relate to a June 11, 2008 email from New Castle County Council President Paul Clark. On the same day, we sent your complaint to New Castle County, and we received their response on August 29, 2008. This is the DDOJ's determination regarding your complaint, pursuant to 29 *Del. C.* § 10005(e).

Statement of the Facts

On June 11, 2008, New Castle County Council President Paul Clark ("Clark") sent an email to approximately two dozen members of the public, asking them to review and comment on proposed legislation concerning the County Unified Development Code. A private citizen forwarded a copy of that email to the New Castle County Chief of Staff. While it is undisputed that the Clark email is a public record, New Castle County has

refused to provide you with records revealing the identity of the individual who forwarded the Clark email to the Chief of Staff.

Relevant Statutes

29 *Del. C.* § 10001 states that, “[i]t is vital in a democratic society . . . that citizens have easy access to public records in order that the society remain free and democratic. Towards these ends, and to further the accountability of government to the citizens of this State, this chapter is adopted, and shall be construed.”

29 *Del. C.* § 10003 provides that all public records must be made available to the public upon request for inspection and copying. A public record is defined as

information of any kind, owned, made, used, retained received, produced, composed, drafted or otherwise compiled or collected, by any public body, relating in any way to public business, or in any way of public interest, or in any way related to public purposes [.]

29 *Del. C.* § 10002(g). However, 29 *Del. C.* § 10002(g)(6) exempts from the definition of a public record “[a]ny records specifically exempted from public disclosure by statute or common law.”

Discussion

The email in contention—the one that forwarded the Clark email to the County Chief of Staff—was information “received” by a public body, “relating . . . to public business,” and therefore it meets the FOIA definition of a public record. The question is whether the County is justified in claiming that the requested record is exempt from disclosure under the any of the enumerated exceptions to that definition. For the reasons that follow, the requested record comes within the common law exemption from public

disclosure for records that reveal the identity of an informant, and is therefore not a public record pursuant to 29 *Del. C.* § 10002(g)(6).

Delaware has recognized a common law right to privacy concerning the identity of an informant. *Bd. of Educ. of Colonial Sch. Dist. v. Colonial Educ. Ass’n.*, 1996 WL 104231 (Del. Ch.). In that case, the court ruled that, in the context of a disciplinary hearing by the Public Employees Review Board, a school district could protect the privacy of students who had made complaints of inappropriate sexual contact by a teacher. Although the accused teacher had a right under labor relations law to “relevant, non-privileged information necessary” to his defense, the court found in the common law “legitimate privacy interests” in the anonymity of the students. *Id.*, at *7, *8. However, a legitimate privacy interest was not, standing alone, dispositive. In order to determine whether the informants’ privacy interest should prevail, the court instructed that the public’s need for the information must be weighed against the government’s interest in maintaining the informant’s confidentiality. *Bd. of Educ. of Colonial Sch. Dist.*, 1996 WL 104231, at *8. In *Elnashar v. Speedway SuperAmerica, LLC*, 484 F.3d 1046 (8th Cir. 2007), the government claimed informant’s privilege under a regulation that codifies the common law. The court held that “[t]o override the informant’s privilege, [the plaintiff] would have to show that he had a clear need for the informant’s identity, weighed against the government’s interest in protecting confidential informants’ identities.” *Id.* at 1052.

Thus, where the government invokes the common law informant’s privilege, we apply a balancing test, weighing the public’s interest in disclosure against the public body’s interest in protecting its sources. As a general rule, the purpose for a FOIA

request is not relevant to the determination of whether a record is public or who may request a record. The reasons for requesting the information are relevant here, however, where we must ascertain whether the public's interest in the identity of the person who forwarded Clark's email outweighs the County's interest in protecting its source.

In your letter of complaint to the DDOJ, you said that the County should reveal the identity of the informant in order to "add important details to the public debate" You went on to explain that if the informant champions the legislation discussed in the email, you may want to call on that person for his or her support, but if the informant opposes the legislation, you may want to address his or her concerns. Those reasons for requesting the informant's identity do not implicate the purposes of FOIA as expressed in § 10001, quoted above. Simply stated, FOIA's purpose is to promote government accountability to the people, not to make the people accountable to the government. Accordingly, the statutory scheme does not contemplate informing the governors of the policy positions of the governed. In fact, it is difficult to imagine any reason related to FOIA's objectives that would entitle the public to this informant's identity. Some articulable reason why this information should be made public is necessary to put weight on the disclosure side of the scales.

On the other side of the balance, the government's interest in not discouraging citizens from reporting potentially illegal conduct is almost self-evident. *E.g., Elnashar*, 484 F.3d at 1053 (government has a "strong interest" in withholding informant's identity in order to "encourage" citizen informants); *News-Journal Co. v. Billingsley*, 1980 WL 3043, at *3 (Del. Ch.) (if civil law-enforcement investigatory files were public records there would be a "chilling effect on those who might bring pertinent information to the

attention of the [public body]”). As there is no public interest weighing in favor of disclosing who forwarded Clark’s email to the County, the County is justified in protecting the informant’s identity.

Conclusion

For the reasons stated herein, it is determined that New Castle County did not violate FOIA in refusing to disclose all records relating to the June 11, 2008 email from Paul Clark.

Very truly yours,

Judy Oken Hodas
Deputy Attorney General

APPROVED

Lawrence W. Lewis
State Solicitor

cc:
Gregg E. Wilson, County Attorney
Sarah Murray, Opinion Coordinator